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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-185

ERNEST E. BYRD, *Petitioner*,

v.

DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL BOARD, *Respondent*.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR RESPONDENT IN OPPOSITION

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the decision of the District of Columbia Alcoholic Beverage Control Board to conditionally renew the liquor licenses of corporations, of which petitioner was a principal officer and director, involves any substantial federal question warranting review by this Court.

2. Whether this Court should exercise its certiorari jurisdiction to review an asserted constitutional question not raised before either the District of Columbia Alcoholic Beverage Control Board or before the court below.

COUNTER-STATEMENT OF THE CASE

Petitioner, Ernest Byrd (hereinafter "petitioner") is an officer and director of five corporations which applied to the District of Columbia Alcoholic Beverage Control Board (hereinafter "the Board") for the annual renewal of their retailer's class "C" liquor licenses.

On January 26, 1970, the Board issued to these corporations an order to show cause why their applications for the renewal of their liquor licenses for the 1970-71 license year should not be denied on the grounds, *inter alia*, that petitioner "* * * does not possess the good moral character required of [a] * * * principal officer or director of a corporation by Section 14(a)1 of the Alcoholic Beverage Control Act"[1] (Petitioner's Appendix 1d-3d).

At the show cause hearing, the evidence persuasively demonstrated, as alleged in the order to show cause, that on October 22, 1969, petitioner was carrying, in the District of Columbia, an unlicensed .38 caliber revolver with which he assaulted two persons, seriously wounding one of them, in violation of the laws of the District of Columbia (Petitioner's Appendix 4a-8a, 2d-3d).

Following the show cause hearing, the Board ordered that the licenses issue on the condition that the corporations suspend petitioner from all officerships and directorships in the corporations, and from any active role in their

[1] Section 14(a)1 of the Act, D. C. Code, 1967, § 25-115(a) (Supp. V, 1972), provides in pertinent part:

"* * * Before a license is issued the Board shall satisfy itself:

"1. That the applicant, * * * if a corporation, each of its principal officers and directors, is of good moral character and generally fit for the trust to be in him reposed." (Emphasis added.)

management until final disposition of the pending criminal charges against petitioner,[2] and also suspended petitioner's manager's certificates, required by D. C. Code, 1967, § 25-115(a)4 (Supp. V, 1972). (Petitioner's Appendix 10a-11a.)

Pursuant to D. C. Code, 1967, § 25-106, petitioner appealed the order of the Board to the Commissioner of the District of Columbia. The Commissioner issued a proposed order affirming the action of the Board to which petitioner filed exceptions, alleging, *inter alia*, that the order of the Board was predicated on bias and prejudice against him. In its response to petitioner's exceptions, the Board denied the allegations of bias and prejudice set forth therein (Petitioner's Appendix 1f-3f, 1g-3g). The Commissioner affirmed the action of the Board (Petitioner's Appendix 1h-2h).

Petitioner then appealed the order of the Commissioner to the District of Columbia Court of Appeals pursuant to D. C. Code, 1967, § 1-1510 (Supp. V, 1972). The District of Columbia Court of Appeals, on April 17, 1972, affirmed the order of the Board, as affirmed by the Commissioner (Petitioner's Appendix 1b-4b). A petition for rehearing or rehearing in banc was denied on May 4, 1972 (Petitioner's Appendix 1e).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner has failed to present any substantial federal question warranting review by this Court.

Petitioner nowhere indicates which, if any, of the "special and important reasons" set forth in the Court's Rule 19

[2] Petitioner was later adjudged guilty of two counts of assault with a dangerous weapon and one count of carrying a concealed weapon, in violation of D. C. Code, 1967, §§ 22-502 and 22-3204, respectively. He was sentenced to jail for 18 to 54 months on one of the assault charges and to lesser concurrent terms on the other two charges. Imposition of all but 4 months of the sentence was suspended, and petitioner was placed on supervised probation for a period of 5 years. These convictions are pending appeal in the United States Court of Appeals for the District of Columbia Circuit.

he believes justify the granting of the petition. Nor does the record disclose any ground for review falling within the standards and considerations governing review on writ of of certiorari prescribed by Rule 19.

In his petition, petitioner raises two questions which were considered by the court below. First, he contends that he was denied due process of law because the Board failed to find that he lacked good moral character, as alleged in the show cause order, and instead based its adverse action on a finding that he was not "* * * generally fit for the trust to be in him reposed" (petition at 8-10).

Before granting the renewal of the liquor licenses of the corporate applicants, the Board was required to satisfy itself that each of the principal officers and directors of the corporations is of good moral character *and* generally fit for the trust to be in him reposed. D. C. Code, 1967, § 25-115(a)1; *Minkoff* v. *Payne*, 93 U. S. App. D. C. 123, 127, 210 F. 2d 689, 692 (1953). Because the Board found petitioner to be generaly unfit for the trust to be reposed in him, as a principal officer and director of each of the corporations, the Board was not required to make an express finding as to petitioner's moral character.

The corporate applicants complied with the Board's order that, as a condition for licensure, they suspend petitioner from all officerships and directorships and from taking an active role in their management, and their liquor licenses were renewed. They at no time appealed the Board's order. Petitioner has thus undertaken to invoke the jurisdiction of this Court to vindicate asserted rights personal to him and not the rights of the corporate licensees. Cf. *Liberty Warehouse Co.* v. *Burley T. G. Co-op M. Ass'n.*, 276 U. S. 71, 88 (1928); *Smith* v. *Indiana*, 191 U. S. 138, 148 (1903).

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As the court below noted, petitioner, who was represented at the show cause hearing by counsel, contemplated and directed his presentation before the Board, not only to the issue of his moral character, but also to the issue of his fitness. Clearly, therefore, he was not denied due process of law.

Second, petitioner contends that the Board's order is predicated on bias and prejudice against him as manifested by (1) the asserted cavalier dismissal of the testimony of 19 character witnesses on his behalf, (2) the transmittal of the Board's order to a federal judge presiding over petitioner's criminal case arising out of the facts which were before the Board, and (3) the Board's failure to timely serve petitioner with its response to his exceptions to the proposed order of the Commissioner of the District of Columbia affirming the Board's order (petition at 16-19).

The Board heard and considered the testimony of all of petitioner's 19 character witnesses, and merely found their testimony insufficient to offset the other damaging evidence against petitioner. Nowhere does the record indicate that the Board "dismissed" their testimony. Mr. Peckham, one of the Board members, transmitted a copy of the Board's order to Judge Gerhard A. Gesell of the United States District Court for the District of Columbia at the suggestion of the Judge's secretary. Mr. Peckham believed at that time that the Judge had pending before him only unrelated civil litigation involving petitioner, and was not aware that the criminal charges arising out of the facts which gave rise to the Board's order had recently been transferred to the Judge. Although the Board did not promptly serve counsel for petitioner with a copy of its response to petitioner's exceptions to the Commissioner's proposed order affirming the Board's action, petitioner had

the full benefit of the Board's response before the District of Columbia Court of Appeals.

There must be a substantial showing of bias to justify a ruling that the show cause hearing was unfair. *United States* v. *O'Rourke*, 213 F. 2d 759, 763 (8th Cir., 1954). There must be a showing that the minds of the Board members were irrevocably closed on whether to grant or deny the renewal of the liquor licenses to the corporate applicants in order to constitute prejudgment of the legal issues before the Board. *F. T. C.* v. *Cement Institute*, 333 U. S. 683, 701 (1948). There has been no such showing here.

The questions as to the propriety of the Board's findings, and of bias and prejudice by the Board against petitioner, which petitioner characterizes as constitutional points, are clearly insubstantial, and constitute "* * * a mere pretext put forward in order to open other questions that otherwise could not come * * *" to this Court. *United Surety Co.* v. *American Fruit Co.*, 238 U. S. 140, 142 (1915).

In a further attempt to invoke this Court's jurisdiction, petitioner contends that, assuming, *arguendo*, the Board did make a finding as to his moral character, such finding, based on an isolated instance of wrongdoing, violates due process of law (petition at 10-16). This question, however, was not raised in the administrative or the judicial proceedings below. In *Street* v. *New York*, 394 U. S. 576, 581-582 (1969), this Court made it clear that it will not consider a constitutional question not presented below. Unquestionally, therefore, petitioner's failure to raise below the constitutional question now tendered precludes its consideration here.

In any event, petitioner's contention is plainly without merit. See, e.g., *Hawker* v. *New York*, 170 U. S. 189, 194-

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196 (1898); *Barksy v. Board of Regents*, 347 U. S. 442 (1954); *Application of Cassidy*, 268 App. Div. 282, 51 N. Y. S. 2d 202 (1944).

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for writ of certiorari should be denied.

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